IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 146 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

M/S. STEEL BUILD

Versus

M/S K.MUKUND & COMPANY

Appearance:

MR KA PUJ for Petitioners No. 1-4

MR FB BRAHMBHATT for Respondent No. 1

MR BY MANKAD, APP for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: /10/2001

C.A.V. JUDGEMENT

1. This Revision Application is filed by the original accused of Criminal Case No. 1180/99 filed by the present respondent No.1 herein in the Court of learned Metropolitan Magistrate, Court No.10, Ahmedabad,

being aggrieved and dissatisfied by the order of learned Metropolitan Magistrate, passed on 19th July, 2000 below Exh.2 rejecting Application - Exh.2 filed by the present petitioners for discharging them for the charges punishable under the Negotiable Instruments Act, 1938.

2. The brief facts of the case are as under :

The above said complaint came to be filed by present respondent No.1 under Section 138 of the Negotiable Instruments Act against all the present four petitioners for the return of two cheques worth of Rs. l,25,000/-. On filing complaint, the learned Metropolitan Magistrate issued process against the present petitioners. The petitioners appeared before the learned Metropolitan Magistrate. In response to the process issued, the petitioners filed discharge application on 31st December, 1999, on the ground that the complaint was not maintainable under Section 138 of the Negotiable Instruments Act. The Notice issued was not in accordance with the law and according to the present petitioners, as per the reply given by them to the above said notice, the amount of cheque complained of has been fully paid by the petitioners and, therefore, the complaint was not maintainable. There are disputed facts about the making of payment of the cheques, which are base of this complaint. It was also contended in the application that the verification of the complainant as per Section 200 of the Criminal Procedure Code was not signed by the complainant and the Magistrate and, therefore, illegality was committed and the proceedings are required to be dropped as per Criminal Procedure Code. The contentions raised on behalf of the petitioners were turned down by the learned Metropolitan Magistrate and the application Exh.2 came to be rejected and hence this Revision Application by original accused.

3. Learned Advocate Mr. K.A. Puj for the petitioners, learned Advocate Mr. F.B. Brahmbhatt for respondent No.1 and learned APP Mr. B.Y. Mankad for respondent No.2 - State of Gujarat, were heard.

4. Learned Advocate Mr.K.A.Puj for the petitioners vehemently urged that in all the petitioners were indebted to respondent No.1 to the extent of Rs. 1 lac only. For that, three cheques were given to respondent No.1 and these cheques were dated 5.4.1999 of Rs. 50,000/-, dated 26.6.1999 of Rs. 25,000/-, and 13.7.1999 of Rs. 25,000/-. Out of these cheques, Cheque dated 5th April, 1999 and 26th June, 1999 were encashed and the payment was made to the present respondent No.1 and on

receipt of the notice of the respondent No.1, the third cheque which was of dated 13th July, 1999, which was not cleared, the payment of the same was made by Demand Draft No.008659 dated 6th August, 1999 for Rs. 25,000/-. Thus the debt of Rs. 1 lac was duly discharged to the respondent No.1 and on the date of the complaint, there was no debt so as to invite Section 138 or Section 142 of the Negotiable Instruments Act. It was urged that the complaint, on these grounds was not maintainable and accused deserves discharge. As per the contention, it is also stated that prior to this, on 6.2.1999, a cheque of Rs. 1 lac bearing No. 093615 was given to respondent No.1 by the present petitioners which was not cleared and, therefore, in lieu of this cheque, the above said three cheques were given to respondent No.1. It is contended that in fact cheque of Rs. 1 lac which was dated 10.2.1999 was required to be handed over back to the present petitioners which respondent No.1 did not and dishonestly claims double payment. Therefore, it was urged that since there was no debt, the complaint is not maintainable under Section 138 of the Negotiable Instruments Act and required to be quashed and accused deserves discharge. It was further contended that under Section 39 of the Indian Contract Act, it is the duty of the creditor to appropriate the payment towards the debt as per the instructions of the debtor, and in this case, the creditor did not appropriate the payment towards debt as instructed by the debtor and, hence, it is falsely shown that the amount is due to respondent No.1. The other contention was in respect of legal aspect that the complaint was presented before the learned Metropolitan Magistrate and according to Section 200 of the Cri. Procedure code, the Magistrate was required to record the verification of the complainant. Employing of phrase "shall" in Section 200 of the Criminal Procedure Code, it is clear that the same is mandatory provision. It was urged that on receiving the complaint, Magistrate though recorded the verification of the complainant but failed to obtain signature of complainant nor subscribe his signature to the verification as envisaged by Section 200 of the Cri. Procedure Code and, thus the illegality is committed and the complaint is required to be dismissed. For this legal defect and the illegality committed, the proceedings are required to be dropped.

5. Learned Advocate for the petitioners Mr. Puj has placed heavy reliance on the decision of the Apex Court in the matter of VANAJA vs. STATE OF KARNATAKA, reported in AIR 2001 SC 1512, wherein Section 164 (4) of the Criminal Procedure Code is discussed by the Apex Court and the Apex Court has held that Words "shall be signed

by the person making the confession" are mandatory in nature and, therefore, omission to get signature of person making confessional statement is fatal. Relying on the analogy, it was urged that similar phrase is used under Section 200 and according to interpretation of the Apex Court on mandatory phrase, while Magistrate has omitted to obtain signature of complainant below the verification and when the Magistrate himself has not signed that verification, the mandatory provision has been breached which is fatal to the prosecution and the complaint deserves to be dismissed solely on this ground. Learned Advocate Mr. Puj has also placed reliance on the decision of the Apex Court in the matter of K.M. MATHEW vs. STATE OF KERALA, reported in AIR 1992 SC 2206, wherein the Apex Court has held that when the court finds no allegation in the complaint or in the commission of the crime, it is implied that the Magistrate has no jurisdiction to proceed against the accused and the fact that the process has already been issued, is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused.

6. As against that, learned Advocate Mr. F.B. Brahmbhatt on behalf of respondent No.1 has contended that as per Section 139 of the Negotiable Instruments Act, certain presumptions arise and to dislodge this presumption, the burden is always on the accused and in the revisional jurisdiction of the High Court, the High Court cannot interfere with the order of issuance of process or to quash the complaint and to discharge the accused. He has also placed reliance on the decisions of the High Courts of Orissa, Calcutta, Madras, Patna, etc., it was urged that failure even to record the verification of the complaint below the complaint is merely an irregularity and not illegality. This irregularity can be cured. It was urged that failure to sign the verification by the complainant as well as by the Magistrate, is also irregularity which can be cured. It was urged that the provision of Section 200 of the Cri. Procedure Code may be mandatory but breach of the provision would be fatal only when it is shown that the prejudice is caused to the accused. The view expressed by various High Courts according to learned Advocate, is that, omission to record verification or signing the same is mere irregularity and not illegality so as to quash the complaint itself. Learned Advocate for the respondent No.1 has urged that the adjustment of account, as contended, is a defence of the accused, and at this stage, the defence of the accused cannot be taken into consideration and, therefore, contention that there was no debt on the date of filing of the complaint has no

substance. Learned Advocate for the respondent No.1 has further relied upon a decision of the Apex Court in the matter of JOHN THOMAS vs. DR. K. JAGADEESAN, reported in JT 2001 (5) SC 398, wherein the Apex Court was pleased to distinguish the case K.A. Mahtew's case (supra) and held that Sec. 258 had no application to the cases which are instituted on complaints by private complaints. Basing his contention on this observation of the Apex Court, it was urged that therefore there was no stage after issuing of the process to discharge the accused or to quash the compliant.

7. Learned APP Mr. B.Y. Mankad on behalf of respondent No.2 State of Gujarat was heard.

8. Having gone through the record and the contentions raised, it appears that the order impugned has been attacked by the petitioners on two folds i.e. on facts as well as on legal aspects. So far as the facts of the case is concerned, it is vehemently contended that in all there was a debt of Rs. 1 lac. Out of which, Rs. 75,000/- were paid by the accused to respondent No.1 by the above said cheques. The third cheque of Rs. 25,000/- was not cleared and on receiving the notice from the complainant - respondent No.1, Demand Draft of Rs. 25,000/- was sent to the respondent No.1 towards the debt of Rs. 1 lac which finally settled the debt and thus there was no debt in existence on the date of the filing of the complainant. Considering the rival contentions and perusing the complaint, the averments are made that, according to the books of accounts, in all, the present petitioners were indebted for Rs.1,67,322/for which the present petitioners have given Cheque dated 13th July, 1999 for Rs. 25,000/-. The petitioners also had given Cheque dated 10.2.1999 for Rs. 1 lac. When both these cheques were deposited in the Bank, the same were returned without payment and hence the complaint was filed by the complainant. The complaint discloses that there was protracted transaction between the petitioners and respondent No.1. In all, right from 31st of August, 1988, present petitioners purchased goods from respondent No.1 to the tune of Rs. 7,12,361/- and towards this debt. before 10th of February, 1999, petitioners made the payment of Rs. 4,70,045 and on 10th February, 1999, still the petitioners were indebted to respondent No.1 to the tune of Rs. 2,42,322/- and towards this amount, the cheque of Rs. 1 lac dated 10th of February, 1999 was given by the present petitioners to respondent No.1, which was returned by the Bank. It was narrated in the complaint that towards the debt of Rs. 2,42,322/- the petitioners made the payment of Rs. 75,000/- vide two

cheques dated 5th April, 1999 and 6th June, 1999 which were credited to the account of the present petitioners. At page 6 of the complaint, the transaction and credit, debit entries are given by the complainant and accordingly on the date of filing of the complaint, the present petitioners were indebted to the extent of Rs. 1,42,322/- and while two cheques, as mentioned above, of Rs. 1,25,000/- were given by the present petitioners to respondent No.1, were returned by the Bank for which the complaint has been filed. It appears that on service of notice, a Draft of Rs. 25,000/- was given to the respondent No.1 by the petitioners. It disclosed by the complaint that before issuing of the notice, which is of dated 22nd July, 1999, the present petitioners were indebted to Rs. 1,42,322/- and two cheques amounting to Rs. 1,25,000/were returned so as to invite the provisions under Section 138 and 142 of the Negotiable Instruments Act. It clearly appears that to this complaint an attempt has been made at this juncture to make out a contention that there was no such debt to the extent as indicated by the complainant in the complaint. It was attempted to make out an issue that only Rs. 1 lac was due to respondent No.1 and the same amount was paid as contended above. Therefore, the dispute is in respect of accounts stated. At this stage, therefore, the point is raised that whether the Court can examine and come to the conclusion that what is sought to be made out by the present petitioners is correct and that the averments made in the complaint are wrong. What is contended vide Application Exh. 2 by the present petitioners is their defence. The petitioners are required to prove their defence during trial. Without recording of the evidence, at this stage, the Court cannot come to the conclusion that the defence taken by the petitioners as an accused is correct, and that the averments made in the complaint are not sufficient to proceed against the accused. So far as this fact is concerned, what was due, is to be decided by leading the evidence and cannot be decided by mere statements of the accused. In other words, mere raising a dispute and defence in response to a process, the accused cannot be discharged unless the allegations made in the complaint are examined fully and the defence of the accused is also considered. In this respect, the Apex Court in the matter of SMT. NAGAWWA vs. VEERANNA SHIVALINGAPPA KONJALGI, reported in AIR 1976 SC 1947 has laid down guidelines when order issuing process by the Magistrate can be interfered with by the High Court under revisional powers. It has been held by the Apex Court in the above said decision that once the Magistrate has exercised his discretion, it is not for the High Court, or even the

Supreme Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminate into an order under Section 204. In para 5, the Apex Court observed as under :

"Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside.

(1) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused.

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused.

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

9. Having considered above guidelines as established by the Apex Court and the facts of the case at hand, the present controversy falls in none of the guidelines given by the Apex Court above. Merely raising of a defence to controvert the allegations made in the complaint at this juncture cannot be taken into consideration to conclude that in view of the defence of the accused, the allegations made in the complaint are not sustainable without allowing the complainant to lead the evidence and to prove his case. In this view of the matter also, the contention raised on behalf of the petitioners is required to be turned down. The Court cannot go in

merits or demerits of the case before the evidence is recorded fully.

10. So far as the contentions of the petitioners based on observations of the Apex Court in K.M. Mathes's case (supra) are concerned, now the Supreme Court in recent decision in the matter of JOHN THOMAS vs. DR. K. JAGADEESAN, reported in JT 2001 (5) SC 398, has made it clear that Section 258 of the Criminal Procedure Code is intended to cover those cases belonging to one category alone i.e. "summons cases instituted otherwise than upon complaints". Section 258 vivisets only "summons cases instituted otherwise than of police complaint into two divisions and out of those two divisions, the Section 258 permits the Court to drop the proceedings only in the category of the cases which are not instituted upon the complaint. In paras 8 and 9, the Apex Court in the above said decision observed as under :

"8. Summons cases are generally of two categories. Those instituted upon complaints and those instituted otherwise than upon complaints. The later category would include cases based on police reports. Section 258 of the Code is intended to cover those cases belonging to one category alone i.e. "summons cases instituted otherwise than upon complaints". The segment separated at the last part of the Section by the words "and in any other case" is only a sub-category or division consisting of "summons cases instituted otherwise than upon complaints." That sub-category is not intended to cover all summons cases other than those instituted on police report. In fact, Section 258 vivisects only "summons cases instituted otherwise than on complaints" into two divisions. One division consists of cases in which no evidence of material witness was recorded. The Section permits the court to acquit the accused prematurely only in those summons cases instituted otherwise than on complaints wherein the evidence of material witnesses was recorded. But the power of court to discharge an accused at midway stage is restricted to those cases instituted otherwise than on complaints wherein no material witness was examined at all."

"9. The upshot of the above is that Section 258 of the Code has no application to cases instituted upon complaints. The present is a case which was instituted on complaint. Hence,

the endeavour made by the accused to find help from Section 258 of the Code is of no avail."

Thus, the Supreme Court has distinguished K.M. Mathew's case (supra) and made the above observations. Therefore, the contention that the Magistrate can drop the proceeding under Section 258 of the Criminal Procedure Code has no substance at all.

11. The Second contention is respect of legal aspect of the matter. It was vehemently urged that Section 200 of the Criminal Procedure Code mandates the recording of the verification, signing of the same by the complainant and the Magistrate, and omission to obey the mandate, is fatal for the prosecution. In this case, it appears that on 16th August, 1999, a complaint is filed. The complaint is duly signed by the complainant. Verification though is recorded by the Magistrate on the same day but it is not signed either by the complainant or by the Magistrate and on the same day the Magistrate without signing the verification, recorded the order of issuance of process against the present petitioners. Now the controversy is whether such defect is fatal to the extent of illegality or the same is simple irregularity which can be cured. Each provisions of law has to be interpreted keeping in mind the object and reasons behind enacting the provision. Section 200 of the Criminal Procedure Code is as under :

"S. 200 Examination of complainant :- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate;

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192;

Provided further that if the Magistrate makes

over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the later Magistrate need not re-examine them.

12. The purpose and object behind enacting a mandatory provision to the effect that the complainant shall be examined on oath and the substance shall be reduced to writing and shall be signed by the complainant as well as by the Magistrate, appears to be to ascertain the facts constituting the offence, where they are not given in the written complaint. The object behind such provision is to ascertain whether there is prima facie case and sufficient ground for proceedings and to correct and elucidate doubtful points in the complaint and to explain the same. The provision is made to separate unfounded from substantial cases at the outset, and to prevent innocent persons to face the trial. The provision is made to help the Magistrate to judge if there are sufficient grounds calling for investigation and for proceeding with the case. Now in the Scheme of the Criminal Procedure Code, the distinction has not been expressly drawn between irregularity and illegality and it clearly appears that the sole criterion in every case is whether there has been a failure of justice. Therefore, the distinction between irregularity and illegality is one of the degree than of substance. Employing the language in the mandatory form itself would not make the observance mandatory, but the real test is what is the effect of non-observance of such provisions. For considering whether the defect is illegal or merely irregular, several factors will have to be taken into account, such as, the form, language of the mandatory provisions, the scheme and object to be achieved and the nature of the violation, etc. The gravity and the defect will have to be considered to determine if it falls within one class or other. This is more so in respect of the provisions in the Criminal Procedure Code which regulates the procedure and which are formed in mandatory form. The test is to examine in such circumstances, whether the non-observance is mere unimportant mistake in procedure or is the substantial and vital. This can be gathered from the facts and the circumstances of the each case and from the reasons of the non-observance of such provisions. If the non-observance is so grave that prejudice is necessarily implies or imported, the non-observance may be described as an illegality. Like wise if the seriousness of the omission is of a lesser degree it will be a simple irregularity and the prejudice to the accused and the failure of justice will have to be established. Something which goes to the root of the

jurisdiction of the courts, and the non-observance is manifestly against the natural justice, like lack of competency of jurisdiction, absence of complaint by the proper person, want of sanction to prosecute, are the omissions may be described as illegality, which per se, may be fatal to the prosecution, while others would be irregularity and not fatal unless gross miscarriage of justice and prejudice to the accused is shown.

13. Having regard to the purpose and object of enacting mandatory provision in shape of Section 200 to regulate the procedure, it clearly appears that failure to sign the verification by the complainant as well as the Magistrate could never amount to such an illegality as to be so fatal that complaint would be required to be quashed unless grave prejudice is shown by the accused. Visualising an instance if an oral complaint is made before the Magistrate, to proceed further, the Magistrate must ascertain the allegation and reduce the same in writing and this is the real object behind enacting procedural provision in mandatory form. Therefore, if any mistake is committed even in failure to record the verification, if any prejudice is likely to be caused, the same can be caused to the complainant and not to the accused. When a written complaint is preferred before the Magistrate and the allegations and accusations are well narrated, what is to be considered in each case is whether the defect affects the competency of the court and occasions in failure of justice. Unless this is established, mere failure to observe mandatory procedural provision, unless failure of justice, and/or prejudice caused to the accused is shown, is simply an irregularity which can be cured. By no stretch of reasoning having regard to the facts of this case, failure to sign the verification by the complainant and the Magistrate can be labelled as an illegality invariably resulting in quashing of the complaint as contended on behalf of the petitioners. This is so because written complaint is filed by the complainant. Accusations are distinctly narrated in averments made in the complaint. Accused have, on service of the process, received the copy of such complaint. Not only that relying on this complaint, accused has filed an application at Exh.2 for discharge and dropping of the proceedings, there cannot be any prejudice said to have been caused to the accused in such circumstances, by merely failure to sign verification by the complainant and by the Magistrate. This view has been taken by various High Courts in various decisions, namely, In the matter of BEGAM RAI vs. THE STATE, reported in AIR (3) 1952 Patna 154; in the matter of API SAMAL vs. BISI MALLIK, reported in AIR 1953 Orissa 83;

in the matter of MAHABIR PRASAD AGARWALA vs. THE STATE, reported in AIR 1958 Orissa 11; in the matter of JASMAN RAI vs. SMT. SONAMAYA RAI, reported in 1980 Cri. L.J. 500 (Sikkim High Court), that even omission to examine the complainant on solemn affirmation is a mere irregularity, which would not in any way prejudice to the accused, and it cannot be an illegality so as to quash the proceedings.

14. Section 164(4) of the Code of Criminal Procedure is not in pari materia with Section 200. Purpose and object enacting both the provsions are altogether different. Confession of the accused is high degree evidence against the accused. Section 164(4) mandates safeguards when the accused chooses to confess the crime and, therefore, the provision is so mandatory that simple defect in procedure may render confession inadmissible. While the purpose behind enacting Section 200 is, as said above, to ascertain the exact allegations made in the complaint. The language employed in both the provisions may be similar, but in their effect, both provisions operates in altogether different fields. In this view of the matter, decision cited on behalf of the petitioners, of the Apex Court in the matter of Vanaja vs. State of Karnataka (supra) would not be of any help to the petitioners.

15. In this view of the matter, there is no substance in this Revision Application and the same is hereby dismissed. Rule is discharged. Interim relief granted by this Court on 13th of August, 2001 is extended for a further period of two weeks from today and shall not be extended further.

(J.R. Vora, J.)
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